Glover Bottled Gas Corp. *and* **John Berini.** Case 29-CA-6989

March 20, 1981

DECISION AND ORDER

On December 11, 1980, Administrative Law Judge Eleanor MacDonald issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and an answering brief to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Glover Bottled Gas Corp., Patchogue, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT suspend our employees for refusing to cross a lawful picket line established at Glover Bottled Gas Corp. by employees of Suburban Corporation represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT discharge, nor threaten to discharge, our employees for refusing to cross a lawful picket line established at Glover Bottled Gas Corp. by employees of Suburban Corporation represented by Local 282.

WE WILL NOT interfere with our employees's access to Board processes by threatening employees with reprisals for filing unfair labor practice charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL expunge the suspensions from the records of those employees unlawfully suspended for refusing to cross the lawful picket line established at Glover Bottled Gas Corp. by employees of Suburban Corporation represented by Local 282.

WE WILL also restore these employees to the status they would otherwise have occupied.

WE WILL offer immediate and full reinstatement to John Berini to his former position of employment, dismissing if necessary anyone who may have been hired to perform the work that he was doing on the date that he was terminated, or, if his former position does not exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of our discrimination. Interest will be paid on these amounts.

GLOVER BOTTLED GAS CORP.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge: This case was heard in Brooklyn, New York, on February 25 and 26, 1980. The complaint based on a charge filed by John Berini issued on March 30, 1979, alleging that Respondent, Glover Bottled Gas Corp., violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, by certain actions including: Sus-

pension of employees who refused to cross a picket line and engaged in a strike; threats to employees for refusing to cross a picket line; discharge of a John Berini and refusal to pay his wages for refusing to cross the picket line, and because he was not a member of the union; and threats and reprisals against John Berini for filing charges and giving testimony under the Act.

Respondent's answer denies the allegations of unlawful conduct and alleges that the picket line was illegal, that the collective-bargaining agreement required the employees to refrain from striking, and that the employee was discharged during his probationary period.

Upon the entire record, including my observations of the demeanor of the witnesses and after due consideration of the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Glover Bottled Gas Corp., a New York corporation, is engaged in the sale and distribution of propane gas and related products at Patchogue, New York, where it annually derives gross revenues in excess of $500,000 from its operations and annually purchases goods and materials valued in excess of $50,000 which are delivered to its plant in interstate commerce directly from other States. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Picketing and the Suspension of Employees*

John P. Russell, vice president of Respondent Glover Bottled Gas Corp. (hereafter called Glover) testified about the events relating to the picketing at the Glover premises.[1] Russell testified that the employees of the Suburban Corporation, a company unrelated to Glover, but engaged in the same type of business, commenced a strike in November 1978. Suburban employees are represented by Local 282, IBT (hereafter called the Union), the labor organization which is also the representative of Glover's employees. The two bargaining units are, of course, separate and distinct. The Glover bargaining unit consists of drivers, platform men, and servicemen. By December 1978, many of Suburban's customers were running out of gas, and the New York State attorney general and certain local government agencies attempted to secure deliveries for hardship cases from Glover as well as from other sources. In addition, some Suburban customers contacted Glover directly. It is not stated in the record whether Suburban itself referred customers to Glover. Russell testified that by law Glover could only make refill deliveries to tanks it owned, and as a result Glover supplied gas to the Suburban customers in Glover gas tanks. However, when Glover's supply of tanks ran out, Glover bought empty tanks from Suburban. Russell stated that the purchase was also convenient in that it permitted Glover to avoid having to disconnect empty Suburban tanks from the locations where they had been installed by Suburban; instead, Glover could make deliveries to the tanks it had newly acquired from Suburban.

Russell testified that Glover drivers who had been making emergency deliveries to Suburban customers with union approval were hesitant to continue these deliveries. As a result, and in order to satisfy union questions apparently directed to the nature of the relationship between Glover and Suburban, copies of the bill of sale for the Suburban tanks were given to Union Shop Steward Richard Cleary sometime in mid-January 1979. Russell testified that Suburban employees began picketing the Glover premises on January 23, 1979, and that copies of the bill of sale were given to the Union 5 or 10 days before the pickets appeared.

For reasons which will be apparent from the discussion below, the employees of Glover and their union officials were not convinced that the contract between Glover and Suburban had any legal effect. Both Shop Stewards Cleary and Ralph Kendrick believed that the picket line at Glover was "legal" because Glover was supplying Suburban customers while Suburban employees were on strike.

A copy of the sales contract was admitted into evidence. The contract is dated December 26, 1978, and the testimony establishes that it was signed about January 15, 1979. The contract provides, *inter alia*, that for a consideration of $1 Suburban shall sell certain assets to New York Propane for a purchase price to be "determined within one year following execution of this Agreement." The assets, listed on Schedule A, are the names and addresses of both individuals and various types of businesses which formerly purchased gas from Suburban. Russell testified that the 1-year waiting period had been designed to permit agreement on the actual value of Suburban's old tanks. However, after the picketing began at Respondent's premises on January 23, 1979, Glover wished to protect itself from being considered an ally of Suburban, and it agreed on a purchase price of $117,000 which Russell stated was paid on January 31 or February 1, 1979. Russell expressed his resentment at having to pay an inflated price for the Suburban tanks as a result of the fact that he was negotiating with undue haste. He testified that the price was "forced upon us by the picket action."

Furthermore, as executed, and as given to Respondent's employees in mid-January 1979, the contract contained the following paragraph 3:

> 3. Seller [Suburban] shall re-purchase said assets from Buyer [New York Propane] at a time of Seller's choosing during twelve month period following the execution of this Agreement, at a total purchase price equal to that paid by Buyer pursuant to this Agreement, and Buyer shall deliver to Seller at the time said option is exercised a Bill of Sale in the form attached hereto as Exhibit C. Buyer shall be

[1] Russell is also president of the Propane Company of America, the parent company of Glover Bottled Gas.

> under no obligation to pay Seller for said assets until such time as Seller elects to re-purchase same.

Russell testified that this paragraph was deleted by Suburban and New York Propane on January 25, 1979, and a rider was attached to the contract providing that:

> Suburban has sold to Propane assets required to service approximately 464 of Suburban's customers. . . . The sale of those assets is a final one. . . Suburban will not either during the period of the strike or at any time thereafter repurchase those assets or reacquire customers. . . .

Russell testified that the intent of paragraph 3 had been to permit Suburban to repurchase some steel tanks but not to repurchase customer accounts nor the steel tanks located on customer premises. It does not appear on the record whether Glover informed the Union of the deletion of paragraph 3 or of the existence of the January 25 rider. However, the picket line continued at the Glover premises on January 25 and was not withdrawn until February 2, 1979. The Glover employees returned to work on February 3, 1979.

The General Counsel's witnesses testified about the picketing at Respondent's premises and their testimony is substantially to the same effect.

Describing the events relating to the refusal of the men to cross the picket line, John Berini stated that he reported for work on January 22, 1979, and saw pickets in front of Respondent's premises. (Actually, the evidence shows that the pickets appeared on January 23.) He testified that he learned that employees of Suburban Propane Company "were picketing against Glover Bottled Gas for pumping their tanks unlawful." The Glover employees entered the plant and punched their timeclocks, but did not start work or take out any trucks. When they did not commence work, Manager Wesley Nott inquired as to their intentions. After about 1-1/2 hours, Shop Steward Cleary arrived. He informed the men that the pickets had a "legal picket line" to protest the fact that Glover had been pumping Suburban gas tanks.

Berini testified that the "union men" decided not to cross the picket line.[2] Berini stated that, upon learning that the men refused to cross the picket line, Nott said that they should punch out because "Mr. Vogel will not pay them for the day" (Sherman Vogel is the secretary of Glover Bottled Gas and chairman of the board of its parent corporation, the Propane Corporation of America.) Cleary testified that, after ascertaining that the men would not cross, Nott told them to punch out and go home.

Berini did not cross the picket line because "when I go back to work I have to work with union men." Cleary told the men to report to work every day and Berini did so, but he did not punch in nor did he work because of the picket line. Berini states that he did not cross the picket line because it was a "legal picket line" and because he decided to follow the lead of the union men.

Shop Steward Kendrick testified that the Union did not tell him not to cross the picket line but that he made this decision for himself. Kendrick maintained that his reasons for not working were the presence of the picket line, his belief that his refusal was sanctioned by the contract, and also fear of possible bodily harm.

The record is uncontroverted that on January 24, 1979, the second day of the strike, Shop Steward Cleary was called by Manager Nott to the phone in the Glover office. Vogel was on the other end of the line and he and Cleary had a conversation. Then, Shop Steward Kendrick was called into the office and Vogel spoke to him while Nott and Cleary listened on extension phones. Vogel had substantially the same conversation with Kendrick that he had just conducted with Cleary. The testimony shows that Vogel began by asking why the men would not work and why they would not cross the picket line. Kendrick replied that he feared for bodily harm." At this point Vogel inquired as to Kendrick's military service and asked: "You wouldn't be afraid to go to war . . . why won't you cross the picket line?" Kendrick then referred to his rights under section 14 of the collective-bargaining agreement.[3] Vogel repeated his request that Kendrick cross the picket line, and then he said, "If you won't cross the picket line then you're suspended."[4]

After Kendrick got off the line, Cleary stayed on the extension phone while Vogel spoke in the same vein to other employees successively, including Steve Nott, Dave Warfield, John Hanson, and Richard Dean.

Berini testified that payday was every Friday. On the Friday after the picketing started, January 26, the paychecks were delayed, and the employees were told that they could get their checks providing they spoke to Vogel. Berini and "half the shop" went over to the driver's room[5] about 5 p.m. where Vogel spoke to the men in the presence of Shop Steward Kendrick. Berini testified that, after some discussion, Vogel stated: "Any man that does not stick behind me and my company, I don't want no part of him, I'll let them go." Berini asked Vogel whether he would fire a nonunion man who did not cross the picket line, and Vogel replied, "you take it as it is."[6] Berini further testified that, on Wednesday during the strike, Zenni told him, "you know you're the

[2] Berini was not a member of the Union. Pursuant to sec. 5 of the collective-bargaining agreement, new employees are required to join the Union 30 days after hiring and the Union may demand the discharge of an employee who has not become a member after 60 days of employment. The testimony shows that, in practice, employees are only expected to join the Union 60 days after being hired. Sec. 4 of the contract provides that employees are not placed on the seniority list until 60 days following their employment. Thus, Berini was a probationary employee from his hiring on December 23, 1978, until his discharge, described below.

[3] Sec. 14 provides: "The Employer shall not discharge or suspend employees for refusing to deliver freight to, or pick up freight from a place of business at which a strike is being conducted, or refusing to cross a picket line." Sec. 12, entitled "Strikes, lockouts, arbitrations and grievances," provides in subsec. (a) that "There shall be no strikes or lockouts during the term of this agreement."

[4] The transcript erroneously gives a phonetic rendition to this phrase and transcribes it as "then just prevent it." However, it is clear from the questions that follow this answer that Vogel referred to "suspended" and not "prevent it," and my recollection of the testimony supports this view.

[5] A location used for certain clerical work.

[6] Vogel did not testify in this proceeding.

only nonunion man that is not crossing the picket line; you know you can lose your job."

Cleary and Kendrick both testified that Vogel called them after the picketing had been going on for 1 week and informed them that the suspensions were lifted. The men went to the plant the next day, but they did not cross the picket line. However, Russell testified that in fact at 6:30 or 7 p.m. on January 23, 1979, the suspension was lifted. Every morning thereafter the suspension was reimposed when the employees did not return to work, and every evening the suspension was lifted. There is no testimony that the employees were told that the suspension was lifted until the second week of the picketing, and the daily suspensions continued until the end of the strike.

B. *The Discharge of John Berini*

Berini testified that he was hired by Respondent on December 23, 1978, as a truckdriver. Berini testified that his supervisor was Jean Zenni (Frenchie), the service manager of Respondent. According to Berini he was hired at $4 per hour and after 1 week he was given a raise to $4.25 per hour because, Zenni said, he was doing "good work." Berini testified that the only negative occurrence with respect to his work record at Glover was an occasion when Zenni asked him to work on the platform where the gas tanks were filled. Berini refused to work on the platform because he considered the condition of the facility dangerous and because it was not truckdriver's work, so Zenni gave him a truck and sent him out as an installation man. One day after the strike ended, Berini testified, Zenni praised the large number of stops Berini made on a certain route.

On Monday, February 5, 1979, Berini testified, Zenni called him into his office and informed Berini he was being laid off for lack of work. When Berini insisted that other men hired after him were not being let go, Zenni said: "I told you this was going to happen, you should have crossed the picket line and you didn't . . . but I will try to talk to Mr. Vogel." Berini thereupon left the office and, seeing Kendrick, asked for his help. The two men went into the office and, when Kendrick pointed out to Zenni that less senior men were not being laid off, Zenni said: "It came down from Mr. Vogel . . . ." Following this conversation, Berini and Cleary met with Zenni and had a substantially similar conversation during which Zenni stated that, in his opinion, Berini was a good worker.

Cleary's and Kendrick's testimony confirms Berini's version of this conversation with Zenni. Both stated that, when they asked if Berini were being fired for refusing to cross the picket line, Zenni replied: "Off the record, yes." Zenni stated that Vogel wanted Berini fired and that, although Berini did good work, there was nothing he could do about it.

Berini testified that he was not paid in due course following his discharge. The record establishes clearly that Respondent's employees are paid every Friday on a 1-week pay lag basis; that is, pay received on each Friday is for week ending the preceding Friday. Berini acknowledged on cross-examination that he understood this to be the case, but he was obviously confused as to the workings of the system.

A careful reading of Berini's testimony convinces me that the facts are as follows: As of Monday, February 5, he was owed a total of 3 days' pay, including the Monday worked before the picketing began (January 22, 1979), and the Saturday and Monday following the resumption of work after the picketing ceased (February 3 and 5, 1979). Berini returned to Glover for his paycheck, and he was told it was not there. He again returned for his pay the day after he filed his charge dated February 7, 1979, with the Board. Vogel was there and, when Berini told Vogel that he had filed charges with the Board, Vogel stated: "you can take your NLRB, you can take all your judges, all your lawyers and you can stick them you know where . . . you're a wise guy." Berini repeated his request for his pay to which Vogel responded: "you're not getting your pay." Berini returned and was paid on Friday, February 9, for the 1 day's pay due him for the week ending January 26, 1979. On that Friday, Vogel said to Berini that he "would be looking for a job or . . . would need a reference some day, and he would get even with [Berini]." Berini testified that "he did, he stopped my unemployment."[7] Finally, on Wednesday, February 14, 1979, at Berini's insistence, Berini was paid for the 2 days still owed to him. It is clear from the record that this was 2 days earlier than the normal Friday payday on February 16, and, in fact, the money was taken out of petty cash as an accommodation. As to this payment, the facts do not show that Berini was paid later than usual or that his pay was withheld.

Jean Zenni, service manager of Respondent, testified that he had hired Berini as an installation helper. Zenni stated that two experienced installation men had worked with Berini but had asked Zenni not to assign Berini to them anymore because of a "mental state where he flew off the handle." Zenni then assigned Berini to the platform, and after a few days he received complaints from the men on the platform relating to Berini "cursing all the time and complaining about doing work and refusing to put in overtime." After this, Zenni testified, he assigned Berini to cylinder deliveries and "I had no problem except that his delivery average was not too high."

Zenni stated that Berini was hired at the rate of $4.25 per hour and that he was never given a raise prior to his discharge.

Zenni testified that he terminated Berini because "he wasn't qualified at all," and he had not become sufficiently proficient during his probationary period. Zenni stated that Vogel did not instruct him to fire Berini. He testified that he told both Kendrick and Cleary that he had no choice but to terminate Berini because he was approaching the end of his probationary period "and I knew that by the time he joined the Union, I would have no choice than to keep him on the force."

[7] Berini expressed his suspicion that Vogel interfered with his collection of unemployment benefits but there is no record evidence that such was the case or that Berini did not receive benefits to which he was entitled.

Zenni stated that another probationary employee, Stanley Wenetta, who had not crossed the picket line after the second day was not discharged and is still employed by Respondent. Other testimony shows that some other probationers did cross the picket line and worked in the yard; they were not terminated.

On cross-examination, Zenni was questioned concerning James Brown, an employee with a low delivery average. Brown is a longtime employee, and Zenni admitted that he was not a satisfactory employee although he had not been discharged. However, Zenni stated that he and the Union had tried to improve Brown's performance and that Brown had been issued a warning slip in 1980. Further, Zenni stated that Brown differed from Berini in that he is "very calm . . . quiet . . . and reliable."

C. *Positions of the Parties*

The General Counsel maintains that the sales contract between Respondent and Suburban is a document of convenience and not an arm's-length contract. The signed document contains no purchase price, and the sum finally agreed upon was not paid until sometime between January 31 and February 2, 1980. Further, the repurchase clause was not deleted until January 25. The General Counsel concludes that Respondent was doing struck work within the meaning of *Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743 (MacMillan Science Co., Inc.)*, 231 NLRB 1332 (1977), and *Local 804, Delivery and Warehouse Employees, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (B. F. Goodrich Company)*, 199 NLRB 1167 (1972). The General Counsel argues that Respondent abandoned its neutral status and that the refusal of the employees to cross the picket line was lawful activity protected by the Act and by section 14 of the collective-bargaining agreement; therefore the employees were unlawfully suspended for refusing to cross the picket line in violation of Section 8(a)(3) of the Act.

The General Counsel points out that Vogel did not testify at the hearing, and that the testimony relating to Vogel's threats is unrebutted in the record. Further, the General Counsel asserts that Zenni did not deny threatening Berini with discharge if he refused to cross the picket line.

The General Counsel asserts that Respondent's March 5, 1979, letter to the Board contains an admission that Berini's refusal to cross the picket line led to his discharge and that the letter does not mention any unsatisfactory work performance by Berini. The General Counsel concludes that but for Berini's union activities he would still be employed at Glover Bottled Gas and that Berini's discharge was in violation of Section 8(a)(3) of the Act, citing *Charles Edwin Laffey, d/b/a Consolidated Services*, 223 NLRB 845 (1976). The General Counsel also asserts that Berini was fired because he was not a member of the Union.

Finally, the General Counsel contends that Vogel's threat to give Berini unfavorable references was a violation of Section 8(a)(4) of the Act.

Respondent's position is that Berini was discharged for cause and not for exercising his rights under the Act. Respondent cites Zenni's testimony that Berini was a poor worker and that this led to his discharge. Further, Respondent urges that Zenni's testimony effectively rebuts any allegation that Vogel threatened employees for exercising their rights. Respondent emphasizes that there was no testimony by any witness that Vogel had ordered Berini terminated for his failure to cross the picket line.

Respondent contends that the evidence shows that probationary employees are very often discharged prior to the date when the contract would give them permanent status. Respondent points to testimony that two other probationary employees who refused to cross the picket line were not discharged and are still employed by Respondent.

Respondent asserts that the General Counsel did not prove that Respondent's employees were on strike. Further, Respondent argues that Respondent's employees refused to cross the picket line for reasons unrelated to concerted activities, that is, that Cleary would not cross because he never crossed any picket line and Kendrick did not cross out of concern for his physical safety. Respondent asserts that the employees' refusal to cross the picket line is therefore unprotected activity under *Redwing Carriers Inc.*, 132 NLRB 982 (1961).[8]

Respondent argues that the collective-bargaining agreement prohibits strikes and does not protect employees in their refusal to cross a picket line unless the picket line is established away from Respondent's place of business. Respondent cites *N.L.R.B.* v. *Rockaway News Supply Company*, 345 U.S. 71 (1953), in support of its contention that where a valid contract compels employees to cross a picket line it is not unlawful to discharge an employee for refusing to cross.

Respondent asserts that the refusal to cross a picket line was not sanctioned by the Union and was therefore an illegal wildcat strike. Respondent concludes that it was thus entitled to discharge those employees who did not work, including Berini, citing *N.L.R.B.* v. *Sunbeam Electric Manufacturing Co.*, 133 F.2d 856 (7th Cir. 1963); *Harnischfeger Corporation* v. *N.L.R.B.*, 207 F.2d 575 (7th Cir. 1953); *N.L.R.B.* v. *Draper Corporation*, 145 F.2d 199 (4th Cir. 1944).[9]

Respondent states that the picket line was secondary in nature and violated Section 8(b)(4) of the Act as its purpose "was an attempt to force Glover from doing business with another." Respondent also states that the purpose of the picketing was unclear and alleges that the signs carried on the picket line were misleading and did not clearly indicate the nature of the dispute. Respondent urges that the picketing was therefore illegal since it "gave the false impression that a labor dispute existed where Glover's employees were not on strike, and where Glover had a bona fide agreement with a union."

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[8] I note that a reading of that decision shows that the Board explicitly did not rule on the Trial Examiner's finding that refusal to cross the picket line for fear of violence was unprotected conduct. The Trial Examiner had relied on *Redwing Carriers, Inc., and Rockana Carriers, Inc.*, 130 NLRB 1208 (1961), which decision was reconsidered and modified in *Redwing Carriers, Inc., and Rockana Carriers, Inc.*, 137 NLRB 1545 (1962). Therefore, I shall not discuss the case cited by Respondent as it can in no way be considered to represent the Board's view of the law.

[9] I will not discuss these cases further since they are totally inapplicable to the facts of this case.

Respondent urges that it was not an ally of Suburban. It alleges that "Glover employees made occasional emergency drops of fuel into Suburban tanks of people who were certified by the Attorney General to be hardship cases without gas to heat their homes and cook their food during the winter of 1979," and that but for making these attorney general/union-approved hardship deliveries, Glover would not have lost its neutral status. Respondent's brief contends that, aside from certified hardship cases, Glover refused to fill tanks owned by Suburban and instead supplied its own tanks to new customers until it had exhausted its supply. Once Glover had no more tanks on hand, Glover sought to purchase those of Suburban's tanks located on customer premises. Respondent's brief asserts that these 464 tanks were represented by the customer names and addresses listed in the bill of sale dated December 1978, between Glover and Suburban. The brief argues that all the terms of the contract were clear except for the final purchase price which could not be determined until an inventory of the conditions of the tanks. Respondent asserts that Glover took title to the tanks immediately and assumed insurance coverage. The brief asserts that the setting of the final purchase price and the closing of the deal with Suburban occurred prior to the commencement of the picketing.[10] With respect to the repurchase clause, Respondent argues that it was never intended for Suburban to repurchase customers, only that it repurchase an equivalent value of steel tanks.

Concerning the suspension of employees for failing to cross the picket line Respondent argues that it was lawful and that it was lifted every evening and reimposed every morning. Respondent states that it was the Union's duty to inform members concerning this action of the employer.

Discussion and Conclusions

The sequence of events testified to by Russell shows that Respondent Glover was indeed an ally of Suburban.

It is clear that in December 1978 Glover was making deliveries to Suburban customers both at their request and at the request of the state attorney general. Glover drivers and Suburban employees were aware of this situation and acquiesced in it, although Glover drivers expressed concern about doing struck work. As time progressed, Glover anticipated running out of its stock of tanks and it needed a source to supply the growing number of Suburban customers. Under existing safety and insurance regulations, Glover could not fill tanks it did not own. For these reasons, Glover decided to take title to the Suburban tanks located on the premises of Suburban customers. It should be noted that the list of these customers which was eventually compiled for inclusion in the sales contract contained names of many business establishments as well as private customers.

The contract was dated December 26, 1978; it was signed about January 15, 1979. As noted above, it contained no purchase price, the consideration was stated to be $1, and it contained the repurchase clause set forth above. Russell's testimony as to the true meaning of the repurchase clause notwithstanding, the language is clear that Suburban could repurchase the same tanks as were listed in the contract for the same amount that Glover had agreed to pay for the tanks, and that Glover did not have to pay Suburban any part of the (undetermined) purchase price until Suburban should decide to repurchase the tanks. In short, no money need ever change hands.

About 5 or 10 days before the Suburban pickets appeared (approximately January 13–18, 1979), Respondent gave copies of this contract to Shop Steward Cleary. The Union was apparently not convinced that this was an arm's-length contract and that Glover was not any ally of Suburban seeking to mask its relationship with a sham contract, for the pickets appeared at Glover on January 23, 1979.

I am similarly unconvinced. The contract as signed on January 15 was not a contract. The stated $1 consideration, the failure to state any purchase price, the lack of a requirement that the amount of the purchase price ever be paid, and the existence of the so-called repurchase clause convince me that no true contract existed. Thus, Glover was doing Suburban's struck work and was filling tanks for the benefit of Suburban.

On January 25, after the pickets had been at Respondent's premises for 2 days, the repurchase clause was deleted. However, this did not cure the lack of an arm's-length contract between Glover and Suburban. There was still no set purchase price and no requirement that Glover pay anything to Suburban for the "purchase" of Suburban tanks. To all intents and purposes, Suburban still owned the tanks that Glover wished its drivers to service by crossing the picket line.

Russell testified that, because of the Glover employees' refusal to cross the picket line, Glover was rushed into agreeing to a purchase price of $117,000 for the Suburban tanks. Although he could not recall when the purchase price was agreed upon and the purchase price paid, Russell stated it was just before the pickets were removed. Thus, I find that once a true arm's-length purchase was consummated, the pickets were withdrawn and the employees returned to work.

Based on the foregoing analysis, I find that during the picketing at the Employer's premises, from January 23 to February 2, 1979, Glover was filling gas tanks that in effect still belonged to Suburban. This work would have been performed by Suburban employees had they not been on strike, and performance of the work by Glover benefitted Suburban because its customers otherwise would have had to sever their relationship with Suburban and enter into new, arm's-length contracts with other suppliers. Therefore, Glover had lost its neutrality by performing struck work and allying itself with Suburban, and it could lawfully be picketed by Suburban employees.[11] It follows that the Glover employees had a

[10] However, the record shows otherwise. Russell testified that the closing at a price of $117,000 was "forced upon us by the picket action" and that the payment took place "just prior to the pickets disappearing."

[11] *Graphic Arts International Union (G.A.I.U.), Local No. 277 (S & M Rotogravure Service, Inc.)*, 219 NLRB 1053, 1054–55 (1975), review denied *Kable Printing Company* v. *N.L.R.B.*, 540 F.2d 1304 (7th Cir. 1976); *Continued*

right protected by Section 7 of the Act to honor the picket line and refuse to work, and that interference with or restraint and coercion of this right or discrimination based upon its exercise is a violation of Section 8(a)(1) and (3) of the Act.[12] Moreover, contrary to Respondent's contentions, the collective-bargaining agreement does not waive the right of the employees to refuse to cross the picket line and engage in a sympathy strike. It is well established that this right may be waived, but such waiver must be clear and unmistakable.[13] In this case, the general language of section 12 of the contract that there shall be no strikes or lockouts is qualified by section 14 which specifically preserves the employees' right, *inter alia*, to refuse to cross a picket line. The clear and unambiguous contract language (quoted above at fn. 3) conclusively refutes Respondent's contention that the collective-bargaining agreement waives the employees' rights not to cross a picket line established at their own place of employment. Therefore, *N.L.R.B.* v. *Rockaway News Supply Co., supra*, is distinguishable on the facts and does not apply to the instant case in the manner contended by Respondent.[14]

It is undisputed that, beginning on the second day of the picketing, the employees were suspended for refusing to cross the picket line. It is of no moment whether the suspensions were lifted and reimposed every day as contended by Respondent. The imposition of discipline from January 24 to February 2, 1979, for refusing to cross the picket line was a violation of Section 8(a)(1) and (3) of the Act. *Amcar Division, ACF Industries, Inc., supra; Gary-Hobart Water Corporation, supra.*

Berini was the chief witness as to the alleged threats made by Vogel; therefore, his credibility is a major issue in this case.

Berini's interpretation of some of the events he testified to was shown to be incorrect. First, Berini testified that, as a retaliation for refusing to cross the picket line and for filing charges with the Board, Respondent withheld his final paycheck. Although Berini stated that he thought he should have been paid all money owed him on the day of his discharge, there was no evidence that Respondent customarily paid discharged employees on the date of their discharge contrary to the usual method of Friday payment described above. The evidence shows that Berini was paid on the Friday after his discharge for the 1 day worked before the strike. This was the first payday after the discharge, and I do not find that it was unlawful to expect him to wait until the usual payday for his wages. I note that the General Counsel advanced no contention that Berini should have been paid during the strike on Friday, February 2, and that failure to pay Berini on that day constitutes a violation of the Act. Further, at Berini's insistence, his final 2 days' pay was given to him 2 days earlier than would have been normal under established pay procedures. Berini also stated his belief that Vogel retaliated by interfering in some way with his collection of unemployment compensation. Again, there was no evidence to support this assertion, and the General Counsel did not show that unemployment compensation was denied Berini for any reason. Based on this discussion, I do not find that Respondent violated the Act by withholding Berini's pay or by retaliating in connection with unemployment compensation.

As to the threat to give Berini a bad reference, it should be noted that this statement was allegedly made a day after Berini informed Vogel that he had filed a charge with the Board. From his testimony and his demeanor, it is clear that Berini believed that Vogel harbored ill feelings toward him for refusing to cross the picket line. It seems that Berini would readily believe that Vogel was capable of almost any form of retaliation against him. Although I believe that Berini was not the most accurate of witnesses, I do not believe that he would fabricate a story out of whole cloth. Thus, I credit Berini's testimony that Vogel mentioned that Berini would need a reference 1 day and that Vogel would "get even." It may be that, if Vogel had testified, he could have given a different meaning to his statements by explaining the context in which they were made or by giving a more exact rendition. In the absence of any denial or other testimony by Vogel, and in view of my belief that although Berini might give an inaccurate interpretation to a statement he would not invent allegations, I find that Vogel did threaten to give Berini an unfavorable reference in retaliation for filing charges with the Board and that Respondent thus violated Section 8(a)(1) of the Act by interfering with an employee's freedom to avail himself of Board processes. *Sunbeam Corporation (Dumas Division)*, 211 NLRB 676, 677 (1974). However, the conduct did not amount to discrimination that would violate Section 8(a)(4). *Ibid.*

With respect to Vogel's statements made at the employee meeting that he would let go any employee who did not cross the picket line, I also find no basis for discrediting Berini's testimony. Berini testified that he had asked Vogel a question about probationary employees at this meeting and his recollection seemed clear and specific. In the absence of any denial by Vogel that he made the threat, I find that Vogel threatened to discharge any employees who did not cross the picket line in violation of Section 8(a)(1) of the Act.

Finally, I must consider Berini's testimony that Zenni also threatened him with discharge if he did not cross the picket line and perform his work. Again, Berini's memory of this occasion seemed clear, and Zenni, who testified at great length, did not deny having made the statements attributed to him. Therefore, I find that Zenni threatened Berini with discharge for refusing to cross the picket line in violation of 8(a)(1) of the Act.

Zenni testified that he made the decision to discharge Berini because he was not qualified. However, Zenni also stated that after Berini was assigned the job of deli-

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Blackhawk Engraving Co. v. *N.L.R.B.*, 540 F.2d 1296 (7th Cir. 1976), affg. *Mount Morris Graphic Arts International Union Local No. 91-P (Blackhawk Engraving Co.)*, 219 NLRB 1030 (1975).

[12] *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925.

[13] *Amcar Division, ACF Industries, Incorporated*, 247 NLRB 1056 (1980), and the numerous cases cited therein.

[14] Manifestly, the dispute between Suburban and its employees was not arbitrable under the contract between the Union and Respondent. Therefore, no implied promise to refrain from sympathy strikes may be read into the contract. *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976).

vering cylinders he had "no problem" except that Berini's delivery average was "not too high." The record shows that Berini's average was no lower than that of James Brown, an employee who has not been discharged. Further, the record does not show that Zenni made any efforts to improve Berini's delivery average or that he warned him that it was low enough to endanger his job. Thus, I do not credit Zenni's testimony that Berini was fired for his poor work performance and that the refusal to cross the picket line was not the reason for discharge.

Although Respondent alleged that other probationary employees who did not cross the picket line were not fired, I do not find this significant in view of all the circumstances herein. First, there was some testimony that these employees had worked part of the time during the picketing or had worked in the yard even though they did not take trucks out. Further, there is uncontroverted testimony that Zenni told Berini that he was the only probationer not working and that he might be fired. I credit the testimony of Kendrick, Cleary, and Berini to the effect that Zenni admitted to them that he had been directed by Vogel to fire Berini because Berini refused to cross the picket line. I do not credit Zenni's denials on this score in view of Zenni's prior threats to Berini.

Based on the uncontroverted testimony concerning threats made by Zenni and Vogel, I find that Berini's refusal to cross the picket line was the motivating factor in the decision to discharge him. Further, based on my discussion of Respondent's defense that Berini was fired for poor work performance, I find that this assertion is a sham and that Berini would not have been fired if he had not refused to cross the picket line. Therefore, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Berini. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 146 (1980).

Finally, I turn to the letter of March 5, 1979, which counsel for Respondent addressed to a Board agent in connection with the Board's investigation of the instant case. The letter sets forth Respondent's view of the facts leading to Berini's termination. It states, in substance, that Berini was terminated during his 60-day "trial period" and before he had joined the Union,[15] and asserts that Berini was terminated rather than being converted into a permanent employee because he "did not adequately fit the job." The letter infelicitously equates probationary status with lack of union membership. As described above, upon successful completion of the 60-day trial period, employees are placed on the seniority list and at the same time they are subject to the union-security clause of the contract. According to the testimony, after 60 days employees can no longer be discharged at will but are afforded the "just cause" protection of the contract enforceable through a grievance-and-arbitration provision. The parties refer to the attainment of this contractual protection as "being in the union" and refer to a probationer as someone who has not yet joined the union, apparently because the placement on the seniority list occurs at the same time the employee is obligated to join the Union.

The General Counsel alleges that the letter of March 5 and the testimony show that Berini was discharged because he was not a member of the Union. My interpretation of the letter's awkward usage is that it is not related to membership or lack of union membership but that it is the common parlance used to describe an employee who does not yet have the protection of the just cause provisions of the collective-bargaining agreement and may be discharged before the end of the probationary period. Thus, I do not believe that the evidence supports a finding that Berini was terminated for lack of union membership in violation of Section 8(a)(3).

CONCLUSIONS OF LAW

1. Glover Bottled Gas Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending its drivers, platform men, and servicemen because they refused to cross a picket line established at Glover Bottled Gas Corp. by employees of Suburban Corporation represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By informing its drivers, platform men, and servicemen that they would be discharged if they refused to cross a picket line established at Glover Bottled Gas Corp. by the employees of Suburban Corporation represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent violation Section 8(a)(1) of the Act.

5. By discharging John Berini because he refused to cross a picket line established by the employees of Suburban Corporation represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By informing John Berini that Respondent would give him an unfavorable reference because he filed charges with the Board, Respondent violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. No other violations of the Act were committed.

THE REMEDY

Having found that Glover Bottled Gas Corp. engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

[15] The letter contains some typographical errors, including a sentence which reads, "If the employer refused to retain the employee after the trial period, then the employee becomes a member of Local 282." This sentence is an obvious reference to the union-security clause of the collective-bargaining agreement and it should be read as follows: "If the employer retains the employee after the trial period, then the employee becomes a member of Local 282."

Respondent should be ordered to expunge the suspensions from the records of those employees who were unlawfully suspended. If any of the discriminatees have been counseled or assessed with any other form of disciplinary action as a result of having been unlawfully suspended, Respondent should be ordered to restore said discriminatees to the status they would have otherwise occupied.

Respondent should be ordered to offer immediate and full reinstatement to John Berini and to make him whole for lost earnings. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Glover Bottled Gas Corp., Patchogue, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending its employees because they refuse to cross a lawful picket line established at Glover Bottled Gas Corp. by employees of Suburban Corp. represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(b) Discharging its employees because they refuse to cross a lawful picket line established at Glover Bottled Gas Corp. by employees of Suburban Corp. represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(c) Informing its employees that they will be discharged if they refuse to cross the lawful picket line established at Glover Bottled Gas Corp. by Suburban Corp. employees represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(d) Interfering with employees' access to Board processes by threatening employees with reprisals for filing unfair labor practice charges.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purpose of the Act:

(a) Expunge the suspensions from the records of those employees who were unlawfully suspended because they refused to cross the lawful picket line established at Glover Bottled Gas Corp. by employees of Suburban Corp. represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and restore said discriminatees to the status they would otherwise have occupied.

(b) Offer immediate and full reinstatement to John Berini to his former position of employment, dismissing, if necessary, anyone who may have been hired to perform the work that he was doing on the date that he was terminated or, if his former position does not exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of the discrimination, in the manner set forth above in the section entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its shop copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."